SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1968
No. 1035

Application on Behalf of

JOSEPH EMMET GROSS,

For Writ of Habeas Corpus.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.

MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL.

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On Appeal From the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.

MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, rendered and entered July 31, 1968, be affirmed and/or that the appeal taken therefrom to this Court, be dismissed on the ground that the said judgment appealed from rests upon an adequate non-federal basis.

Statement.

This is a direct appeal from a judgment entered July 31, 1969, by the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Appellant was charged in a verified complaint, filed in the Municipal Court of the Los Angeles Judicial District with two counts of having violated Penal Code Section 311.2. It was alleged that on June 16, 1967, the appellant "did wilfully and unlawfully and knowingly send and cause to be sent, bring and cause to be brought into this state for sale and distribution, and in this state prepare, publish, print, exhibit, distribute, offer to distribute, and have in his possession with intent to distribute, obscene matter, to wit: Obscene Film."

On December 11, 1967, the appellant pursuant to California Penal Code Section 1538.5 made a motion to suppress the evidence. By memorandum opinion the court denied the motion on February 23, 1968.

An appeal of the denial of the motion was taken to the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles. Briefs were filed in said appellate court and oral argument presented. The matters were submitted and thereafter on July 31, 1968, the order denying the motion was affirmed with a written unpublished opinion (Jurisdictional Statement, Appendix "A"). A petition for Rehearing or Certification to the Court of

Appeal was denied on August 13, 1968 (Jurisdictional Statement, Appendix "B'). On November 4, 1968, the appellant filed a Notice of Appeal to the United States Supreme Court in the Appellate Department of the Los Angeles Superior Court.[1]

On or about October 11, 1968, the appellant filed a petition for writ of habeas corpus in the California Supreme Court. The petition was denied without a hearing on November 13, 1968 (*Gross on Habeas Corpus,* 69 A.C. No. 16, Min. p. 4).

[1]This was the judgment of the highest court of the State in this proceeding since certification to the Court of Appeal was denied. (*Schmerber v. California,* (1966) 384 U.S. 757, 16 L. Ed. 2d 908).

ARGUMENT.

I.

The Appeal Was Not Docketed in Compliance With the Rules of This Court.

> Not more than ninety days after the entry of the judgment appealed from it shall be the duty of the appellant to docket the case. . . .
>
> Rule 13 of Rules of United States Supreme Court.

The judgment of the Appellate Department was entered on July 31, 1968. The Petition for Rehearing or Certification was denied on August 13, 1968. Though the appellant did file the Notice of Appeal in the Appellate Department within ninety days on November 4, 1968, his case was not "docketed" in this Court until February 11, 1969. Therefore the case was not timely docketed.

Though the appellant believed "that the better remedy would be to proceed by way of habeas corpus to the California Supreme Court", this collateral attack on the Appellate Department's judgment does not justify the appellant's violation of Rule 13 of this Court.

II.

Probable Cause Existed for Issuance of the Search Warrant.

Sgt. Anthony Baldassano of the Los Angeles Police Department was conducting an investigation on June 15, 1967. Robert A. Rubin was under observation by Sgt. Baldassano and at approximately 9:00 P.M. on that date, Sgt. Baldassano observed Rubin drive to 6410 Colgate Avenue, in the City of Los Angeles.

This is the address of the home of appellant [R. T. pp. 61, 62].

Rubin was observed to enter the home and stay approximately one hour [R. T. p. 66]. Sgt. Baldassano observed both Rubin and appellant emerge from the house and go to a car [R. T. pp. 66, 67], parked near Rubin's car [R. T. p. 68]. Sgt. Baldassano observed the appellant remove two brown paper bags from his car and give them to Rubin [R. T. p. 67]. A brief conversation ensued [R. T. p. 68]. Rubin placed the bags in his car and drove off [R. T. pp. 68-70]. Sgt. Baldassano followed Rubin. Rubin was arrested at approximately 12:15 A.M. on June 16, 1967 [R. T. p. 7]. Rubin had been continuously under Sgt. Baldassano's surveillance until he was arrested [R. T. pp. 73-74].

During this time Sgt. Donald D. Shaidell of the Los Angeles Police Department was obtaining a search warrant for the search of Rubin's home and car [R. T. p. 14]. Upon issuance of this warrant which authorized a search of appellant's home and car, Sgt. Shaidell went to Rubin's home and executed the warrant [R. T. p. 15]. Several reels of 8mm. movie prints were seized from Rubin's car [R. T. pp. 18-19]. Sgt. Shaidell looked at the films.

Sgt. Shaidell then contacted Sgt. Baldassano by radio, learned of Rubin's present location [R. T. p. 17], and went to that place [R. T. p. 71]. Rubin was arrested in the vicinity of Cahuenga Boulevard and Barham Boulevard [R. T. p. 55]. A search of the car disclosed two brown paper sacks in the rear seat [R. T. p. 74]. The officers observed that the sacks contained 12 and 24 reels of 8mm movie. The twelve

movies, entitled "B-Boy", depicted acts of sexual intercourse and oral copulation [R. T. pp. 35-36]. The twenty-four movies, entitled "A-9", depicted a lone female engaged in acts of masturbation [R. T. pp. 38-40]. There were numerous copies of each film and the officers inspected several of them [R. T. pp. 37-40].

After transporting Rubin to jail the officers returned to appellant's home and at approximately 2:30 A.M., they identified themselves and placed appellant under arrest [R. T. p. 7] for conspiracy to violate Section 311.2 of the California Penal Code [R. T. pp. 58-59]. After this arrest and after receiving permission from appellant, the officers searched appellant's car and house [R. T. p. 47-48]. They found reels of 8mm. movies depicting acts of sexual intercourse and oral copulation [R. T. p. 23]. A brown paper bag containing 9 reels of film was found in the house as well as a box containing 28 reels of film in 35mm tin cans [R. T. p. 23].

A search warrant cannot be issued but upon probable cause, supported by affidavit, naming and describing the person, and particularly describing the property and the place to be searched.

California Penal Code Section 1525.

The standard or test of probable cause in a search warrant is approximately the same as that applicable to an arrest without a warrant, namely; such a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused.

Galena v. Municipal Court, (1965) 237 Cal App. 2d 581, 586.

Robert A. Rubin was known to Sergeant Shaidell, the affiant, as an individual he had previously arrested on "obscenity" charges. Shaidell had participated in "obscenity" investigations involving films made at [redacted]'s residence. Rubin had been seen by other officers entering the premises of persons subsequently arrested for violation of "obscenity" statutes. Known pornography dealers have been seen at Rubin's home [Affidavit, pp. 2-4].

An anonymous phone call was received by another officer and related to Sergeant Shaidell to the effect that Rubin was in possession of 1,000 reels of 8mm movies depicting acts of sexual intercourse and oral copulation. This disclosure was supported by a conversation overheard by a fellow vice officer during the course of an obscenity investigation the day after the phone call. On the morning of the day the warrant was issued, Sergeant Shaidell observed another person known to a companion of the affiant to be a person previously arrested for violation of Penal Code Section 311.2, in the company of Rubin at his home [Affidavit, pp. 4-6].

The information from the anonymous telephone call was corroborated the next day, not by another informant, but rather by statements made by third parties, overheard by an officer investigating obscenity. In addition Rubin was well known to Sergeant Shaidell as a person involved with obscenity on several previous occasions and on the day that the search warrant was sought, Sergeant Shaidell observed a known distributor of obscenity come to Rubin's house, leave carrying a carton, and deliver the carton to another known distributor of obscenity.

Each case must be determined on its own facts. Based on the foregoing, it is submitted that there was sufficient evidence presented to the magistrate to justify the issuance of the search warrant; namely, information received from an unknown informant, coupled with substantial corroborating facts known or discovered by the affiant.

The affidavit described the property to be taken as follows: "films showing males and females engaged in acts of sexual intercourse, oral copulation, sodomy and masturbation." [Affidavit, p. 1]. These are factual descriptions, specifically limited to films showing each of these four acts or combinations thereof. These are not conclusionary assertions on the part of the affiant. The affidavit particularly describes the property to be seized in accordance with the requirements of Section 1525 of the California Penal Code. This requirement is met if the property is described with reasonable particularity (*Dunn v. Municipal Court,* (1963) 220 Cal. App. 2d 858, 868).

Appellant cites *Lee Art Theatre v. Virginia,* (1968) 20 L. Ed. 2d 1313, 1315, but this case merely holds an affidavit stating only the conclusion that the film was obscene is insufficient. Here the affidavit sets forth in detail the scenes depicted. In *Flack v. Municipal Court,* (1967) 66 Cal. 2d 981, no search warrant was involved. But in *Aday v. Superior Court,* (1961) 55 Cal. 2d 789, seizure of books under a search warrant based on an affidavit to which a copy of the book was

attached was upheld. It was there held that Penal Code Sections 1539 and 1540 afford sufficient and prompt methods of securing an adversary judicial review. In *Aday v. Municipal Court,* (1962) 210 Cal. App. 2d 229, seizure under search warrant issued on affidavit describing the alleged obscene material was approved again affirming the adequacy of Penal Code Sections 1539 and 1540 as satisfying the requirements of this Court in *Marcus v. Property Search Warrant,* (1961) 367 U.S. 717 (See also: *Holden v. Arnebergh,* (1968) 265 A.C.A. 103).

California Penal Code Section 1538.5 specifically authorizes a motion to return property brought on the ground the property is protected by the free speech and press provisions of the federal and state constitutions.

Appellee contends that no prior adversary proceeding was required prior to execution of the search warrant. The procedure that was followed in the instant case prior to any search or seizure assures free society that the sensitive determination of obscenity will be made judicially and not *ad hoc* by police officers in the field. It was the magistrate who determined whether the material described in the affidavit was obscene. The magistrate authorized seizure of the film. This judicial determination was not a violation of the First Amendment. The Search Warrant Statutes of California are constitutional.

III.

The Arresting Officer Had Probable Cause to Believe That a Felony Had Been Committed.

The officer testified that he arrested appellant for conspiracy to violate section 311.2 of the California Penal Code—a felony.

A criminal conspiracy is an agreement or criminal partnership, the design and object of which is to do an unlawful act or a series of unlawful acts accompanied by an overt act to effect the object of such agreement *(People v. Munoz,* (1961) 198 Cal. App. 2d 649, 655).

The agreement may be inferred from the acts and conduct of the defendants in mutually carrying out a common purpose in violation of the statute *(People v. Scott,* (1964) 224 Cal. App. 2d 146, 151).

Here appellant was seen removing two bags from a car and handing them to another arrestee. This conduct occurred after the two had spent approximately an hour together in appellant's house. Within a short time thereafter the bags were found to contain films portraying sexual acts. Clearly the necessary elements of conduct inferring an agreement and an act in furtherance thereof were observed by the arresting officer.

The test of probable cause to make an arrest is whether or not a state of facts is known to the officer that would lead a man of ordinary care and prudence to believe, or to entertain a strong suspicion, that a person arrested is guilty (*People v. Perez,* (1968) 259 A.C.A. 391, 399). In determining whether there was

reasonable cause for the arrest the officers are justified in taking into account the past conduct, character and reputation of the person suspected (*Farnsworth v. Cote,* (1962) 199 Cal. App. 2d 762, 768). The state of facts here is clearly sufficient to constitute probable cause that a felony had been committed. A police officer may arrest a person without a warrant whenever he has reasonable cause to believe that the person has committed a felony (*People v. Hines,* (1968) 260 A.C.A. 13, 16).

IV.

There Was Probable Cause That a Misdemeanor Had Been Committed in the Presence of the Arresting Officers.

California Penal Code Section 311.2 prohibits, among other things, the distribution of obscene material. Section 311 defines "distribute" as the transfer of possession, whether with or without consideration.

Here one of the arresting officers saw appellant remove the two bags from his car and hand them to Rubin. Within a short time, found by the court below to not be unreasonable, (Memorandum Opinion) the officers determined that the bags contained films depicting sexual conduct. They then knew that a misdemeanor had been committed in their presence and they immediately proceeded to arrest appellant. There was, therefore, no unreasonable delay prior to the arrest of appellant (*Roynan v. Batten,* (1942) 55 Cal. App. 2d 861, 866).

V.

The Search for and Seizure of Evidence From Appellant Without a Warrant Was Lawful.

The search of appellant's house and car were pursuant to a lawful arrest of him at that location. Appellant consented to the search [R. T. pp. 47 to 48]. In addition there was a high probability that appellant would learn of Rubin's arrest and hide or destroy the films. The officers responding to the emergent nature of the situation lost no time in effecting appellant's arrest and the search pursuant thereto.

Appellant cites *Flack v. Municipal Court,* (1967) 66 Cal. 2d 981, in support of the proposition that a search pursuant to a lawful arrest without a warrant in an obscenity case, is unconstitutional. *Flack* does place limitations on such searches, however, it excepts from these limitations the legitimate emergency situation (*Flack v. Municipal Court, supra* at p. 991). Such an emergency situation existed here. In addition *Flack* is not controlling because the search was consented to. Appellant also asserts that a search without a warrant is limited to felony cases. The classic justifications for the doctrine of search incident to an arrest is the need to discover hidden weapons and the need to prevent destruction of evidence by the defendant (*People v. Webb,* (1967) 66 Cal. 2d 107, 118). The need to prevent the destruction of evidence, *i.e.,* the films, is precisely the justification for the search here. No limitation is imposed restricting it to felonies, though the arrest here was made for a felony anyway.

Conclusion.

The appeal does not disclose that there has been a violation of appellant's rights under the Federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with the applicable decisions of this Court, or decided a federal question of substance not theretofore determined by this Court.

Appellee urges, therefore, that the appellant presents no substantial question for the decision of this Court; that the judgment sought to be appealed from should be affirmed or the appeal dismissed.

Respectfully submitted,

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